

**Erin R. Ranahan (SBN: 235286)
WINSTON & STRAWN LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90071-1543
Telephone: 213-615-1700
Facsimile: 213-615-1750
Email: eranahan@winston.com**

Michael S. Elkin (*admitted pro hac vice*)
Thomas P. Lane (*admitted pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-6700 (Telephone)
(212) 294-4700 (Facsimile)
Email: melkin@winston.com
Email: tlane@winston.com

Attorneys for Defendant MYXER INC.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ARISTA RECORDS LLC, a Delaware limited liability company; *et al.*,

Case No. CV 08-03935 GAF (JCx)

vs.

**MYXER INC., f/k/a mVISIBLE
TECHNOLOGIES, INC., et al.**

Defendants.

MYXER'S RESPONSE TO UMG's SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF UMG RECORDING INC.'S MOTION FOR SUMMARY ADJUDICATION ON LIABILITY OR, ALTERNATIVELY, A DETERMINATION OF MATERIAL FACTS NOT GENUINELY AT ISSUE

Date: August 23, 2010
Time: 9:30 a.m.
Place: Courtroom 740
Judge: The Hon. Gary A. Feess

Pretrial Conference: Sept. 20, 2010
Trial Date: Oct. 5, 2010

I. INTRODUCTION

Plaintiffs’ (“UMG”) discussion in its Supplemental Brief of *Columbia Pictures Indus. Inc. v. Fung*, No. 06 CV 5578, 2009 U.S. Dist. LEXIS 122661, at *63 (C.D. Cal. Dec. 21, 2009) fails to draw any meaningful analogies to this case. Not only was *Fung* dealing with a separate safe harbor, thus setting forth no analysis of the Section 512(c) safe harbor that UMG says is at issue here, but the defendants in *Fung* designed and promoted their system to facilitate infringement. See *Viacom International Inc. v. YouTube, Inc.*, 2010 WL 2532404, *11 (S.D.N.Y. 2010) (holding the defendant YouTube was entitled to DMCA safe harbor protection under § 512(c), and noting that *Fung* involved “an admitted copyright thief whose DMCA defense under § 512(d) was denied on undisputed evidence of ‘purposeful, culpable expression and conduct’ aimed at promoting infringing uses of the websites”).

Myxer’s system and comprehensive copyright compliant policies bear no resemblance to those in *Fung*. Myxer was not designed or ever promoted as a means to facilitate infringement; instead, it is a legitimate business conceived to simplify the delivery of personal computer content to mobile devices, with its core focus on independent bands and musicians. Moreover, unlike the defendants in *Fung*, Myxer offers significant amount of authorized partner content, including from major record labels other than UMG, and from third parties and UMG’s own artists who have rights to the same songs alleged as infringing in this action. In stark contrast to the defendants in *Fung*, Myxer expeditiously removed any unauthorized material upon discovery, it implemented a strong and comprehensive repeat infringer policy, and it developed and implemented not only its own filtering system and its Protect Program, but also employed third party filtering to bolster it. Myxer did everything it could to keep unauthorized content off its site. As *Fung* is wholly distinguishable from the facts here, the Court should decline to adopt the principles applied in *Fung* to foreclose Myxer’s rightful DMCA safe harbor protection.

1 **II. FUNG IS ENTIRELY DISTINGUISHABLE FROM THIS CASE**

2 In *Fung*, the court found that the defendants had induced copyright
 3 infringement, and for the same reasons, they were not entitled to DMCA safe harbor
 4 protection. *Id.* at *18. The court in *Fung* relied on a catalog of acts in holding that the
 5 defendants were liable for inducement and not entitled to DMCA safe harbor
 6 protection, including: the defendants soliciting uploads of feature films; the
 7 defendants creating links for downloading unauthorized movies; statements by the
 8 defendant Fung that he was stealing from “lechers” not artists; the defendants’
 9 facilitation of infringement by moderators; spidering of suspicious websites, and
 10 admissions that the appearance of popular copyrighted works helped increase ad
 11 revenue. *Id.* at *11-*12. Myxer’s alleged conduct comes nowhere near the
 12 defendants’ misconduct in *Fung*. Thus, the DMCA-disqualifying inducement found
 13 present in the *Fung* action is simply not present here.

14 The defendants in *Fung* hosted a “peer-to-peer” file-sharing site that the court
 15 found was “an evolutionary modification” of Napster and Grokster systems. *Id.* at
 16 *19-*22; *see also, Viacom International Inc.* 2010 WL 2532404 at *11 (declining to
 17 rely on *Fung* given that it “involved peer-to-peer file-sharing networks which are not
 18 covered by the safe harbor provisions of DMCA § 512(c).”) The *Fung* court relied on
 19 “almost wholly unrebutted” evidence that the defendants promoted their site to
 20 facilitate infringement, including through recommending software applications that
 21 frustrate copyright enforcement, assisting users with locating certain unlicensed
 22 copyrighted works, and contributing “technical assistance” designed to solicit
 23 infringing activity. *Id.* at *1, *11-*13. Myxer’s system is *not* a “peer-to-peer” file-
 24 sharing site; Myxer retains the ability to delete files if it receives notice or otherwise
 25 discovers suspected infringements. The protection at issue here is afforded by §
 26 512(c), as UMG states in its Supplemental Brief. (p. 1:26-27). Unlike the many
 27 examples relied on by the *Fung* court to conclude that the defendants induced
 28

1 copyright infringement, there is no evidence that Myxer “promoted” infringing
 2 activity.

3 The court in *Fung* also noted that there was “overwhelming statistical evidence”
 4 that “90%-95%” of the content on the defendants’ website was allegedly infringing.
 5 *Id.* at *17. The *Fung* court noted this was “a percentage that is nearly identical” to
 6 *Napster*, where 87% of the files were allegedly infringing. Even construing the
 7 evidence most favorably to UMG, UMG does not allege anywhere near 90% of
 8 Myxer’s content is allegedly infringing. Indeed, of the millions and millions of files
 9 that have been uploaded to Myxer by its users, UMG has only alleged that 245 of its
 10 works have been infringed. (UMG’s First Amended Compl. (Dkt. No. 202) pp. 44-
 11 47; Myxer’s Statement of Genuine Issues (Dkt. No. 399) (“SGI”) ¶ 158, p. 70).¹

12 In *Fung*, the defendants failed to present evidence that they had a meaningful
 13 copyright policy. In fact, the *Fung* court noted that “Defendants have not introduced
 14 any evidence that they ‘act[ed] expeditiously to remove, or disable access to, the
 15 [infringing] material’ once they became aware that this infringing activity was
 16 apparent.” *Id.* at *17. Conversely, far from being the lawless “pirate ringtone bazaar”
 17 in UMG’s hyperbole, Myxer spent a great deal of time, effort and money complying
 18 with the DMCA and keeping unauthorized content off its site. Myxer’s policies have
 19 always strictly prohibited users from uploading infringing content, and Myxer has
 20 always immediately removed suspected infringements upon notice, even where UMG
 21 failed to comply with the DMCA requirements in providing notice. [SGI ¶¶ 209-210].
 22 Myxer’s commitment to preventing infringement extends far beyond its legal
 23 obligations, including its “takedown-staydown” policy, where identical works subject
 24 to prior takedowns are blocked from future uploads, and its PROTECT program,
 25 where content owners can disable works directly without requiring notice to Myxer.

26 ¹ See also SGI ¶¶ 10, 189-190 (UMG’s expert’s highly inflated percentage of items
 27 that are allegedly owned by UMG, combined with the now settled Warner and Sony
 28 plaintiffs, fails to exclude works not even at issue herein, but is still significantly
 lower than the percentages at issue in *Napster* and *Fung*.)

1 [*Id.* at ¶¶ 193-195; 201-202].

2 **III. MYXER HAS NOT BEEN WILLFULLY BLIND TO INFRINGEMENTS,
3 AS THERE IS NO EVIDENCE THAT MYXER FAILED TO ACT UPON
4 “RED FLAGS” OF INFRINGEMENT**

5 While UMG attempts to liken Myxer to “pirate sites,” the legislative history
6 discussing red flag knowledge in this context actually notes that an online service
7 provider (“OSP”) “would not be required to make discriminating judgments” about
8 copyright infringement (as would be required here) and has “no obligation to seek out
9 copyright infringement;” but that red flags may exist where sites are “clearly” and
10 “obviously” a “sophisticated ‘pirate’ director[y]—which refer[s] Internet users to
11 other selected Internet sites...that are obviously infringing because they typically use
12 words such as ‘pirate,’ ‘bootleg.’” S. Rep. No. 105-190, at 48-49. UMG has not--and
13 cannot--allege that Myxer comes close to the “pirates” that were intended to be
14 excluded from DMCA safe harbor protection. UMG’s Supplemental Brief fails to
15 actually cite to any specific evidence of red flags, instead relying on unspecified
16 evidence of “all of the facts and circumstances on which Plaintiff relies . . .” (*Id.* at
p.3:25-27, n. 1).

17 While UMG insists that the “standard advocated” by Myxer—which would
18 require that UMG notify Myxer of “specific infringing files denoted by a URL”—is
19 “fundamentally inconsistent” with the DMCA, UMG ignores its explicit requirement
20 to identify the location where the material resided so that Myxer could locate it. 17
U.S.C. § 512(c)(3)(A)(iii). UMG argues that a “representative list” is sufficient to put
21 Myxer on notice of all of its alleged infringements, an argument it made, and which
22 the court rejected, in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F.Supp.2d
23 1099, 1110 (C.D. Cal. 2009), where again UMG ignored the language of 17 U.S.C. §
24 512(c)(3)(A)(iii).²

26 ² The *Veoh* court explained that “[r]equiring Veoh to perform such searches would
27 also conflict with the principle articulated in CCBill that [t]he DMCA notification
procedures place the burden of policing copyright infringement--identifying the
28 potentially infringing material and adequately documenting infringement--squarely on

1 Although UMG argues that Myxer seeks to impose “its own legal standard,”
 2 Myxer is merely seeking that the Court adopt the proper standard, as already
 3 recognized by the courts in California (*Veoh*) and New York (*YouTube*). UMG also
 4 argues that Myxer’s proposed standard would “upset the delicate balance” between
 5 the respective interests the DMCA was intended protect, which is “to preserve[]
 6 strong incentives for service providers and copyright owners to cooperate to detect
 7 and deal with copyright infringements” and provide “greater certainty to service
 8 providers concerning their legal exposure for infringements.” S. Rep. No. 105–190, at
 9 20 (1998). UMG apparently believes this “balance” to be illusory, as it ignores its
 10 notification obligations under the DMCA and cites no specific examples of Myxer
 11 failing to remove a single known infringement, instead citing vaguely to unspecified
 12 “overwhelming evidence” and “all of the facts and circumstances on which Plaintiff
 13 relies.” (UMG’s Supp. Brief, p. 2:7-8; 3:25-26). Under UMG’s interpretation,
 14 “general awareness” (*Id.* at 4:12) of copyright infringement would render OSPs liable
 15 notwithstanding safe harbor compliance.

16 **IV. A FINANCIAL BENEFIT IS NOT PRESENT AND WAS NOT
 17 NECESSARY TO DETERMINATION**

18 Because financial benefit is only considered in a case where Myxer does have
 19 the requisite ability to control the infringing activity, there is no need for the Court to
 20 consider the financial benefit prong. 17 U.S.C. § 512(c)(1)(B). But even if this Court
 21 concludes that Myxer did somehow have the ability to control the infringing content,
 22 and thus considers the financial benefit inquiry proper, Myxer still qualifies for
 23 Section 512(c) safe harbor because Myxer did not receive a financial benefit “directly
 24 attributable” to the allegedly infringing content. *Id.* Courts that have analyzed the
 25 financial benefit prong for purposes of Section 512(c) as part of their holdings have

26 the owners of the copyright.”” *Id.* at 1110. Further, here Myxer *did* do artist and title
 27 searches of all works identified in the original and amended complaints in this action
 28 going beyond its legal obligations in seeking to prevent infringements, even where
 UMG failed to comply with the DMCA notification requirements. (SGI ¶¶ 210, 213).

1 required a more direct connection than required under the common law approach
 2 UMG advocates. *See CoStar*, 164 F. Supp. 2d at 695, 705; *see, e.g.*, 3 Melville B.
 3 Nimmer & David Nimmer, *Nimmer On Copyright*, 12B.04[A][2][b] at 12B 55–57
 4 (2008). Given the relatively small percentage of allegedly infringing files on Myxer,
 5 and Myxer’s prompt removal of all suspected infringements, there is no evidence that
 6 Myxer received a financial benefit directly attributable to allegedly infringing content.

7 Contrary to the approach UMG advocates from *Fung* and *Napster* (a non-
 8 DMCA case), courts have found that for an OSP to be found to have the requisite
 9 “ability to control” to expose it to liability, the service provider must exercise a
 10 “greater level of control than the threshold level that is required simply to qualify for
 11 the Section 512(c) safe harbor.” *Veoh* at 1114. In *Perfect 10, Inc. v. Cybernet
 12 Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002), the court noted that
 13 “closing the safe harbor based on the mere ability to exclude users from the system is
 14 inconsistent with the statutory scheme.” Accordingly, the *Cybernet* court applied a
 15 separate standard for the “ability to control” in the context of Section 512(c) than it
 16 applied in evaluating the plaintiff’s claim for common law vicarious infringement,
 17 because “Section 512 is meant to encourage some level of copyright enforcement
 18 activity by service providers, not to punish it.” *Id.* at 1173–74, 1181.

19 UMG argues that “there is no dispute” that Myxer “could have used Audible
 20 Magic or other similar services to prevent infringing ringtones from ever reaching its
 21 servers and its users.” (UMG’s Supp. Br. p. 5:20-22). While UMG claims this
 22 “starkly differentiates” Myxer from “other online defendants that have successfully
 23 invoked the DMCA,” it ignores the careful analysis in *Veoh* regarding filtering. As
 24 the *Veoh* court found, “UMG has not established that the DMCA imposes an
 25 obligation on a service provider to implement filtering technology at all, let alone
 26 technology from the copyrighted holder’s preferred vendor or on the copyright
 27 holder’s desired timeline.” *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665

1 F.Supp.2d 1099, 1111 (C.D. Cal. 2009). The *Veoh* court rejected UMG’s argument
 2 that Veoh’s “right and ability” to implement filtering software, either “standing alone
 3 or even along with Veoh’s ability to control users’ access” was sufficient to disqualify
 4 Veoh from Section 512(c) safe harbor given the language of Section 512(m). Thus,
 5 the *Veoh* court found that the “applicability of the Section 512(c) safe harbor does not
 6 turn on when Veoh implemented the filtering system that UMG prefers.” *Id.* at 1113.
 7 Several other courts that have analyzed Section 512(c)(1)(B) have reached similar
 8 conclusions. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001)
 9 (rejecting argument that eBay had “right and ability to control” because it removed
 10 infringing items in past)³; *Ellison v. Robertson* 189 F. Supp. 2d 1051, 1061 (C.D. Cal.
 11 2001), *aff’d in part and rev’d in part on different grounds*, 357 F.3d 1072, 1079 n.10
 12 (9th Cir. 2004) (noting that Congress would not create “a confusing, self-contradictory
 13 catch-22 situation that pits 512(c)(1)(B) and 512(c)(1)(C) directly at odds with one
 14 another” and that “the DMCA requires more than the mere ability to delete and block
 15 access to infringing material after that material has been posted in order for the [O]SP
 16 to be said to have ‘the right and ability to control such activity.’”); *Veoh* at 1113-14.

17 V. CONCLUSION

18 The *Fung* case is wholly distinguishable from the case here, and accordingly
 19 presents no applicable analysis. For the reasons discussed in Myxer’s Opposition to
 20 UMG’s Motion for Summary Adjudication, its Supplemental Brief, and herein,
 21 UMG’s motion should be denied.

22 Dated: August 2, 2010

WINSTON & STRAWN LLP

23 By: /s/ Erin R. Ranahan

24 Michael S. Elkin
 Thomas P. Lane

25
 26 ³The *eBay* court also held that eBay’s limited monitoring of its website for apparent
 27 infringements did not constitute the “ability to control,” because “the legislative
 history shows that Congress did not intend for companies such as eBay to be
 penalized when they engage in voluntary efforts to combat piracy over the Internet.”
Id. at 1094.

Erin R. Ranahan
Attorneys for Defendant,
MYXER INC.

Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543